SUPREME COURT, U. S.
73-1044

IN THE

Supreme Court of the United States

October Term, 1973

No. 72-2964

VICTOR PETRUCCI,
Petitioner,
vs.
UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable Chief Justice Warren Burger and to the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioner, Victor Petrucci, respectfully petitions this Honorable Court for a writ of certiorari directed to the United States Court of Appeals for the Ninth Circuit to review and reverse judgments of conviction of eight counts of alleged violation of Title 18 Section 922, et seq., and for alleged illegal possession of two tear gas guns in violation of the National Firearms Act, 26 USC 5868(d).

JURISDICTION

Jurisdiction is conferred by Title 28, Section 1254, U.S. Codes and by Rule 23, Rules of this Court.

The Court of Appeals rendered its decision September 10, 1973. A petition for rehearing was duly filed and denied by that Court on December 10, 1973.

This petition for writ of certiorari is being filed within 30 days thereafter, within the time allowed by law.

OPINION BELOW

The opinion of the Court of Appeals, rendered September 10, 1973, is attached hereto, marked Appendix "A", and made a part hereof.

The order of the Court of Appeals denying the petition for rehearing is attached hereto, marked Appendix "B", and made a part hereof.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Involved herein are the Fourth, Fifth, Sixth, Ninth and Tenth Amendments to the Constitution of the United States.

Also involved are the Gun Control Act of 1968, 18 USC 922, et seq.; The National Firearms Act, 26 USC 5868(d).

QUESTIONS PRESENTED

1. Whether the Federal Court had jurisdiction where the firearms in question had no interstate nexus.

2. Whether the Gun Control Act of 1968 violates the Constitution of the United States on wholly intrastate activity.

3. Whether the failure to instruct the jury on the word "willful", as charged in each count in the indictment, voided the indictment and made it the indictment of the Judge and not that of the Grand Jury.

4. Whether the officers were limited in their search and seizure by the authority of the search warrant and any seizure beyond that authority was void.

5. Whether the defendant could raise Fifth Amendment privileges in this petition.

6. Whether the Gun Act, as construed and applied in this case, involves the Ninth and Tenth Amendments to the Constitution of the United States.

THE FACTS

Victor Petrucci, the petitioner, maintained a jewelry and loan company at 894 March Street, San Luis Obispo, for five years or more prior to the return of the indictment in this case. He was a licensed gun dealer, having a license from the Federal government.

Thomas G. Velie entered the store of petitioner in plain clothes. He was a special federal investigator

for the Alcohol, Tobacco and Firearms Section of the Federal Government.

The special investigator for the government entered the store on March 3, 1972, with Norman Abrams, who stated he was an ex-convict and no other proof. He testified that the Treasury agent sitting at the table gave him the money in $20 bills to purchase a shotgun. He said the A.T.F. agent gave him $100 to buy two guns. At no time did he inform the defendant he was working for the government nor that any statement that the defendant might make to him could be used against him for self-incrimination.

After the two sales, the A.T.F. agent procured a search warrant and an arrest warrant. Pursuant to the warrant, the agents effected the arrest of the defendant and seized a number of guns not listed in the warrant. None of them were in interstate commerce and were resting on the shelf of the shop.

A review of the forms of sales indicated that petitioner had sold firearms to a minor and that he had looked at the minor's driver's license. These also were not guns in interstate commerce.

Prior to the trial the appellant filed a notice of motion to suppress and return evidence illegally searched and seized in violation of the Fourth Amendment to the Constitution of the United States. The motion was noticed before Magistrate Geffen, who transferred the motion to the United States District

Court. The case was assigned to Judge Charles Carr, who denied the motion to suppress.

At the outset of the trial, the government sought to file a superseding indictment eliminating the word "willful" in the earlier indictment. Counsel for appellant objected and asked for a delay as his whole defense was largely based on the fact that his client had not acted *willfully*. (R.T. 3) The Court then denied the motion to file the superseding indictment and counsel was not required to waive or stipulate to striking that word from the indictment. (R.T. 6)

The Court finally said that the defendant would go to trial on the original indictment (leaving the word "willfully" in the indictment). (R.T. 7-8) Nevertheless, during the instructions to the jury, the Court told the jurors to ignore the word "willful" in the indictment. The judge told the jury . . . "The indictment says 'willfully'. You are to disregard the word 'willfully'. I am treating it throughout this indictment as surplusage." (R.T. 720)

The defendant objected to the jurisdiction of the Court under the indictment "because there is no allegation in the indictment that this was in interstate commerce or had anything to do with commerce, and the last time we were in court your Honor asked the government if there was any contention that this was in interstate commerce, or words to that effect, and they said no, that these guns have not been in interstate commerce, are not involved in interstate commerce." (R.T. 9)

The Court denied the motion of the defendant, contending that the Court did not have jurisdiction because interstate commerce was in no way involved. (R.T. 9-11)

The Court also denied motions ot suppress the evidence and return the articles seized based on the insufficiency of the search warrant.

The jury found the petitioner guilty of each of the eight counts and the court sentenced him to three years imprisonment, the first six months in custody.

REASONS FOR GRANTING THE WRIT

As stated by the Court of Appeals, it is conceded by the government that it has not charged nor proved that the firearms in question have any interstate nexus. There is nothing in a pawn broker having guns in his store to give it interstate characteristics, for as Mr. Justice Stewart says in *Perez v. U.S.*, 402 US 146, 28 L.ed.2d 686, almost all criminal activity, be it shoplifting or violence in the streets, may have an interstate setting.

We think his remarks in his separate opinion fit the situation in this case, wherein he said: "Because I am unable to discern any rational distinction between loan sharking and other local crime, I cannot escape the conclusion that this statute was beyond the power of Congress to enact. The definition and prosecution of local, intrastate crime are reserved to the States under the Ninth and Tenth Amendments." (402 US 158,

28 L.ed.2d 694; see also *U.S. v. Bass*, 404 US 336, 30 L.ed.2d 488)

It is important that this Court clarify the Gun Law and whether the Courts are governed by the requirements of the Ninth and Tenth Amendments to the Constitution of the United States.

The Court's instruction to the jury eliminating the requirement of "willfullness" as surplusage vitiated the indictment and each count thereof, as the indictment was no longer the indictment of the Grand Jury but that of the Judge who had altered it. The fact that the Grand Jury had returned an indictment based upon the element of willfullness did not permit the trial Judge to change the indictment as returned by the Grand Jury and upon which the defendant was placed on trial. (*Ex parte Bain*, 121 US 1; *Russell v. U.S.*, 369 US 749, 8 L.ed.2d 240) The decision of this Court runs squarely in the face of the Circuit Court's decision in *Edgerton v. U.S.*, 143 F.2d 697, in an opinion written by Chief Judge Denman, where the Court said:

> "It has long been established that federal courts are without power to alter or amend indictments found by a grand jury, for otherwise the rights of persons charged with crimes would be at their mercy and control and the protection afforded by the Fifth Amendment of the Constitution would be defeated. *Ex parte Bain*, 121 US 1, 13 7 S.Ct. 781, 30 L.ed. 849. The government does not deny this basic principle, but asserts that the trial court here merely withdrew from the consideration of

the jury extraneous averments unsupported by evidence. In this assertion it relies upon *Salinger v. United States,* 272 US 542, 47 S.Ct. 173, 71 L.ed. 398.

* * *

"It is true that in the present case there has been no physical striking of a portion of the indictment. But the submission to the jury for consideration in reference to the evidence of a count which has been altered by the omission of a phrase is, in effect, to try the defendants on a charge not found by the grand jury, and it is this result which comes within the principle of the *Bain* case. *Dodge v. United States,* 2 Cir., 258 F. 300, 305, 7 L.R.A. 1510." (143 F.2d 698, 699)

The doctrine recognized in *Edgerton* was recognized by the Appellate Court in its citation of *US. v. Harvey,* 428 F.2d 782, interpreting an Arizona statute where this Court said:

"But the indictment in this case is not amended either by physical notation on the face of the indictment or, as in *Edgerton v. United States,* 143 F.2d 697, 698 (9th Cir. 1944), by an express instruction to the jury *that the court had stricken certain words from the indictment.*"

This is exactly what happened in this case. The defendant had a right to rely on the indictment as found by the Grand Jury and upon which its action was based and not upon an amendment at the end of trial by express instruction to the jury to ignore the

language of the indictment as returned by the Grand Jury. (*Ex parte Bain*, 121 US 1, 30 L.ed. 849; *Russell v. U.S.*, 269 US 749, 8 L.ed.2d 240; *Heisler v. U.S.*, 394 F2d 692, 695 (9th Cir.); *Stirone v. U.S.*, 361 US 212, 4 L.ed.2d 252; *U.S. v. Norris*, 281 US 619, 74 L.ed. 1076)

In *U.S. v. Bishop*, 36 L.ed.2d 941, the Supreme Court has discussed the word "willfully" in several aspects particularly relating to tax offenses. The Court said:

> "Thus the word 'willfully' may have a uniform meaning in the several statutes without rendering any one of them surplusage."

The Grand Jury in returning an indictment is not limited to the words of a statute. The criminal charge brought by the Grand Jury must disclose all the elements essential to the commission of the offense charged and therefore inform the defendant of the nature and cause of the accusation against him. (*Burton v. U.S.*, 202 US 344, 372, 50 L.ed. 1057)

Rule 7, F.R.Cr.P., provides that the indictment shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.

In *U.S. v. Cruikshank*, 92 US 542, 557, 558, the accused is held to have the constitutional right to be informed of the nature and cause of the accusation. If the Grand Jury determines that the offense is only committed if it is "*willfully*" done, then it accords the defendant the limitation upon which he can be tried.

The fact that the statute does not contain the word "willful" did not limit the Grand Jury from requiring this element to be established before the accused could be convicted. We submit that it was fatal error for the Court to instruct the jury to disregard the plain language of the indictment as returned by the Grand Jury.

The case of *U.S. v. Harvey,* is an interpretation of an Arizona Statute and does not control the words used by an indictment generally. (428 F.2d 782)

The Court erred in holding that Congress and the Courts have jurisdiction to regulate all businesses engaged in importing, dealing and manufacturing firearms and may reach wholly intrastate activities.

The definition and prosecution of local intrastate crimes are reserved to the states under the Ninth and Tenth Amendments. The states have their own gun control laws. Therefore it was error to charge the appellant with a series of federal crimes that do not come within any intent to regulate interstate activity.

The Court erred in failing to suppress the evidence, both on pretrial motion and on trial motion.

The officers entered the premises and their right *to enter was based solely upon a search warrant.* Their right to be on the premises, therefore, was limited to the search warrant and not to a general statute.

Statutes authorizing search warrants must be strictly construed. (*Perry v. U.S.,* 14 F.2d 88)

The affidavit supporting a search warrant must affirm facts by one having personal knowledge and not merely belief or suspicion and unless those facts are sufficient to show probable cause, the affidavit is insufficient basis for a search warrant. (*Hagen v. U.S.*, 4 F.2d 801; Siden v. U.S., 9 F.2d 241)

One thing cannot be seized under a warrant describing another. (*Marron v. U.S.*, 275 US 192)

A search warrant commanding a Marshal to seize papers and accounts does not authorize him to seize cancelled checks.

The Fourth Amendment provides that "No warrant shall issue, but upon probable cause supported by Oath or Affirmation and *particularly describing* the place to be searched and the persons or things to be seized."

That Amendment should be liberally construed to preserve the citizen's right to immunity from unreasonable searches. (*Grau v. U.S.*, 287 US 124, 77 L.ed. 212)

The articles to be seized must be specifically described. (*Boyd v. U.S.*, 116 US 616; *Takahashi v. U.S.*, 143 F.2d 118; *One Plymouth Sedan v. Pennsylvania*, 380 US 693, 14 L.ed.2d 170; *Weeks v. U.S.*, 232 US 383, 58 L.ed. 652; *Mapp v. Ohio*, 367 US 643; *Aguilar v. Texas*, 378 US 114, 12 L.ed.2d 729; *Giordanello v. U.S.*, 357 US 486, 2 L.ed.2d 1509)

Any extension of the activities of the officers beyond their search warrant was an invasion of the pri-

vacy of the defendant and illegal and violated the Fourth Amendment to the Constitution of the United States as well as the Ninth and Tenth Amendments.

The government seeks to stretch and the Court goes along with it that a crime has been spelled out without any charge or proof of interstate nexus. We think the Court majority opinion in *U.S. v. Bass,* 404 US 336, 30 L.ed.2d 488, sustains our position.

WHEREFORE, petitioner prays that this Honorable Court grant certiorari and reverse the judgments below.

Respectfully submitted,

MORRIS LAVINE,
Attorney for Petitioner.

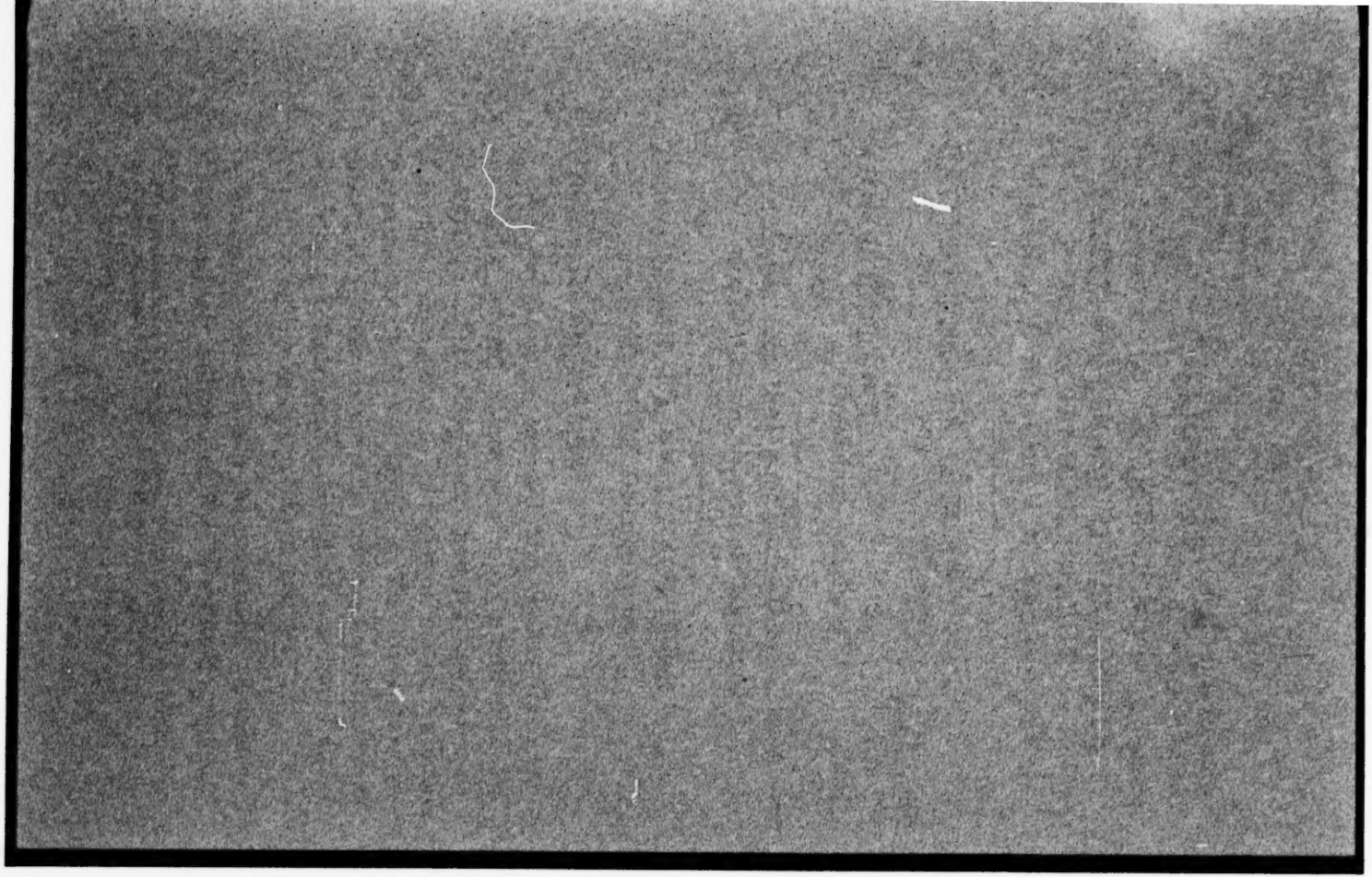

EXHIBIT "A"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed Sept. 10, 1973; Clerk, U.S. Court of Appeals]

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	No. 72-2964
vs.	)	
VICTOR PETRUCCI, Defendant-Appellant.	)	

On Appeal from the United States District Court
for the Central District of California

Before: MERRILL and WALLACE, Circuit Judges,
and PECKHAM, District Judge*

PECKHAM, District Judge:

The defendant, a licensed gun dealer, was prosecuted for several violations of the Gun Control Act of 1968, 18 U.S.C. 922 *et seq.*, and for illegal possession of two tear gas guns in violation of the National Firearms Act, 26 U.S.C. 5868(d). The grand jury returned an indictment in nine counts. Count nine was dismissed before trial and defendant was found guilty by a jury on the remaining eight counts.

In counts one and two the defendant was charged with knowingly selling firearms to a minor; in counts

*Honorable Robert F. Peckham, United States District Judge for the Northern District of California, sitting by designation.

three and five, with knowingly selling firearms to a convicted felon; in counts four and six, with the failure to properly record the transactions charged in counts three and five. Count seven charges the defendant with illegal possession of two tear gas guns and count eight with the failure to keep records or receipts of twelve guns found in his store.

I

THE FACTS

In March of 1972, an agent of the Alcohol, Tobacco, and Firearms Division of the Teasury Department (ATF agent) and Norman Abrams, a convicted felon, went into the defendant's store and on two occasions purchased firearms from the defendant notwithstanding the fact that Abrams told the defendant that he was a felon. With respect to the first purchase, the defendant was found to have falsified the records so as to make it appear that the firearms sold had never been in the store. In the second purchase by Abrams, the defendant sold the firearms to him under an assumed name.

After these two sales, A.T.F. agents procured a search and an arrest warrant.[1] Armed with the warrants, during normal business hours, the agents ef-

[1]The warrant read in part: "There is now being concealed certain property, namely firearms records, and United States currency with recorded serial numbers, three twenty dollar bills with serial numbers, G 08606851A, G 11314128B, L 73197040B, which are fruits, instrumentalities and evidence of violations of Title 18 U.S.C. Section 922 (b) (5); 922 (d) (1); 922 (m); and 924 (a)."

fected the arrest. They then proceeded to inventory the firearms and compare the inventory with the records. Initially they found nineteen firearms without receipts, but because the inventory lasted so long, the defendant (released on bond), had already returned from a hearing before the Magistrate. He accounted for seven of the firearms, which were not seized, but the remaining twelve were seized and form the basis for count eight in the indictment.

Additionally, two tear gas guns, found in the store, were of the type required to be registered with the Treasury Department.

In addition a review of A.T.F. forms revealed a wholly separate set of transactions where the defendant sold firearms to a minor. The minor's age appeared on the face of the A.T.F. forms. The defendant was shown at trial to have at least looked at the minor's driver's license. These transactions became the basis for count one and two of the indictment.

From a conviction on all eight counts the defendant appeals. He asserts no less than fourteen different grounds for error. We discuss only the most salient.

II

INTERSTATE NEXUS

It is conceded by the government that it has not charged nor proved that the firearms in question have any interstate nexus. It is the law in this circuit, how-

ever, that Congress intended, in the Gun Control Act of 1968, to regulate all businesses engaged in importing, dealing, and manufacturing firearms, *United States v. Redus*, 460 F.2d 185 (9th Cir. 1972), and that Congress, consistent with the Constitution may reach wholly intrastate activities. *United States v. Colicchio*, 470 F.2d 977 (4th Cir. 1972); *United States v. Lebman*, 464 F.2d 68 (5th Cir. 1972). See *Perez v. United States*, 402 U.S. 146 (1971), holding Congress may reach intrastate loansharking. So long as the wholly intrastate activity falls within a category of activity which affects commerce, Congress may validly enact criminal statutes. The Congressional purpose, set forth in the legislative history, is to assist the states effectively to regulate firearms traffic within their borders. S. Rep. 1097, 90th Cong., 2d Sess. (1968); H.R. Rep. 1577, 90th Cong. 2d Sess. (1968). Illegal intrastate transfer of firearms is part of a pattern which affects the national traffic and Congress can validly enact a comprehensive program regulating all transfers of firearms. See *Cody v. United States*, 460 F.2d 34 (8th Cir. 1971).

United States v. Bass, 404 U.S. 336 (1971) is inapposite. The *Bass* case turned on Congress's failure to clearly manifest its intent to regulate intrastate activity when it passed the National Firearms Act. The Gun Control Act, however, has been held not to be subject to the same criticism. *Redus, supra.* Moreover, some courts have suggested that the business of interstate transfer of weapons has a greater nexus

with interstate commerce than does mere possession which is regulated by the National Firearms Act. *United States v. Nelson, supra.* Accordingly, there is no merit to the contention that the conviction is invalid for failure to charge and prove interstate nexus.

With respect to the charges in count seven brought pursuant to 26 U.S.C. § 5861(d), for illegal possession of a pen gun which can fire a bullet, there is no requirement whatever to prove any interstate commerce nexus as the statute is passed pursuant to Congress's taxing power. *United States v. Tous*, 461 F.2d 656 (9th Cir. 1972); *United States v. Giannini*, 455 F.2d 147 (9th Cir. 1972).

III

FAILURE TO REQUIRE WILLFULNESS

The indictment originally charged that the defendant knowingly and willfully did the acts charged, but willfulness is not an element of the crime involved. *United States v. Freed*, 401 U.S. 601, 607-08 (1971); *United States v. Jones*, 446 F.2d 12, 13 (9th Cir. 1971). On the morning of the trial the government offered a superceding indictment which omitted the word wilfully. The trial court refused to allow the superceding indictment, but followed the practice approved by this court in *United States v. Harvey*, 428 F.2d 782 (9th Cir. 1970). The court announced, from the beginning, that it would refuse to instruct on the word "wilfull" as that was mere surplusage. (RT. 28). This does not

amount to a modification of the indictment. *Harvey, supra.* Any prejudice to the defendant was obviated by the court when it announced its intention at the start of the trial that it would not instruct on the word "wilfull". *See also United States v. Nelson,* 472 F.2d 905 (9th Cir. 1973).

IV

SEIZURE OF THE FIREARMS

Defendant contends that the taking of the firearms from his store violated his fourth amendment rights. These firearms were introduced in evidence, over objection, and the trial court refused to grant a pretrial motion to suppress. The A.T.F. agents had a valid search warrant authorizing the seizure of only defendant's records. But apart from the warrant, 18 U.S.C. 923(g) gives the A.T.F. agents, during normal business hours, the right to examine the records and inventory firearms. The recent case of *United States v. Biswell,* 406 U.S. 311 (1972) approved Congress's authority to allow such warrantless searches. Having intruded legitimately, upon discovery of several unrecorded firearms, the agents were free to seize the weapons without a warrant as evidence or instrumentalities of illegal activity now in their "plain view" as a result of a lawful search. *See Coolidge v. New Hampshire,* 403 U.S. 443 (1971). See also *Warden v. Hayden,* 387 U.S. 294 (1967), abolishing the distinction between mere evidence and instrumentalities of crime. In the *Biswell* case the Court approved the seizure of

firearms held without payment of the appropriate tax to the Treasury Department, notwithstanding the fact that the agents did not have a warrant. The court felt that Congress's balancing of the relevant concerns was not an unreasonable one. The Court reasoned that businessmen who engage in federally regulated and licensed commercial activity accept the burdens and benefits of their activity. *Compare Biswell, supra,* and *Colonnade Catering Corporation,* 397 U.S. 72 (1970) with *Almeida-Sanchez v. United States,* 41 U.S.L.W. 4970 (1973). *See also United States v. Voegele,* 346 F. Supp. 7 (D. Mich. 1972). Given the broad authority conferred by the statute, the court has no cause to consider whether the search exceeded the scope of the warrant, nor reason to pass upon any other basis for upholding the search.

V

RECORD-KEEPING REQUIREMENTS

Defendant claims that the record-keeping requirement of the Gun Control Act of 1968 violates his fifth amendment rights. He claims with respect to counts one and two of the indictment, selling a firearm to a minor, he was required, under penalty of law to furnish the government through the use of A.T.F. forms, information on which he was tried and convicted. This objection was not properly raised in the court below. Neither at the time of the introduction of the forms, nor upon motion to suppress, nor upon a motion for judgment of acquittal did the defendant claim that

his fifth amendment privilege was being violated. Nor did the defendant urge below, and he has not urged here, that his failure to record at all the firearms charged in count eight is not punishable consistent with the fifth amendment.

It is the law in this circuit that except in extraordinary circumstances, *Marchetti v. United States,* 390 U.S. 39 (1968), *Grosso v. United States,* 390 U.S. 62 (1968) (Brennan, J. concurring), and *Haynes v. United States,* 390 U.S. 85 (1968), require that the fifth amendment privilege be timely raised at trial as a condition to being asserted on appeal. *United States v. Williams,* 427 F.2d 1031 (9th Cir.) *cert. denied* 400 US. 909 (1970).

Moreover, in light of this court's concurrent sentencing doctrine, *United States v. Moore,* 452 F.2d 576 (9th Cir. 1971), since the defendant was validly found guity of six other counts and received coextensive concurrent sentences on each count, it is not likely that counts one and two will have collateral consequences. The court declines to consider the effect of the privilege on the record-keeping requirement of 18 U.S.C. §923(g) until the matter is timely raised and preserved for appeal.

AFFIRMED.

EXHIBIT "B"

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
[Filed Dec. 10, 1973; Clerk, U.S. Court of Appeals]

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	No. 72-2964
vs.	)	
VICTOR PETRUCCI, Defendant-Appellant.	)	

ON PETITION FOR REHEARING

Before: MERRILL and WALLACE, Circuit Judges, and PECKHAM, District Judge

Appellant's petition for rehearing herein is denied.